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No. 86-1729

In the Supreme Court of the United States

OCTOBER TERM, 1987

CALIFORNIA STATE LANDS COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

JACQUES B. GELIN
WILLIAM B. LAZARUS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

2.5 pm

QUESTIONS PRESENTED

1. Whether federal law supplies the rule of decision to determine ownership of lands exposed as a result of shoreline recession at Mono Lake.

2. Whether the court of appeals correctly affirmed the district court's conclusion that the exposed lands at Mono Lake are relicted lands that belong to the United States as the upland owner.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 805 F.2d 857. The decisions of the district court (Pet. App. A14-A48) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1986, and a timely petition for rehearing was denied on January 30, 1987 (Pet. App. A49). The petition for a writ of certiorari was filed on April 28, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Mono Lake is a navigable lake, covering an area of approximately 68 square miles, which lies at the lowest part of the Mono Basin immediately east of the Sierra Nevada in eastern California (Pet. App. A2). Because all

drainage in the basin flows toward the lake and there is no surface or subsurface outlet, water entering the lake is balanced only by evaporation losses from the lake. The lake reached its highest marked level in 1919, and two significant declines since that high stand have resulted in recession of water from the shoreline.[1] This recession has, in turn, resulted in the exposure of a band of previously-submerged land around the lake.

The United States own approximately 70 percent of the uplands surrounding Mono Lake. The federal uplands were retained by the United States when the State of California entered the Union and were withdrawn from the public domain in 1931 in order to preserve the area for recreation and grazing, as well as to protect the watershed. Act of Mar. 4, 1931, ch. 517, 46 Stat. 1530.[2] The State of California owns the submerged lands beneath Mono Lake, as "lands beneath navigable waters within the boundaries" of the State. 43 U.S.C. 1311(a); see also *Shively* v. *Bowlby*, 152 U.S. 1 (1894). This litigation concerns the ownership of the lands exposed by the recession of the shoreline.

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[1] The first decline, from 1919 to 1935, was caused by climatic variation—drought. The second, from 1945 to 1981, was caused primarily by diversions of several of the streams that otherwise would have fed the lake, but also from climatological factors because the diversions took place during a period of significantly below-average precipitation. The stream diversions occurred pursuant to permits issued in 1940, by the State of California to the City of Los Angeles, to help supply the City's water needs. Pet. App. A37.

[2] In 1972, the lake's Negit Island was designated an "Outstanding Natural Area" (37 Fed. Reg. 18224), and, in 1984, the United States Department of the Interior's Bureau of Land Management designated the public lands within the Mono Lake Ecological Area an "Area of Critical Environmental Concern" (49 Fed. Reg. 7664). Congress has also recently indicated the continuing federal interests in the federal lands in the Mono Basin by designating the Mono Basin National Forest Scenic Area in Title III of the California Wilderness Act of 1984, Pub. L. No. 98-425, 98 Stat. 1632.

2. On August 19, 1980, the State filed this quiet title action against the United States claiming title to the previously-submerged lands. The Sierra Club and the Natural Resources Defense Council intervened on behalf of the United States. The case was litigated in two phases, the first of which concerned whether federal or state law governed and which law supplied the rule of decision in the case (Pet. A2-A3). Following the filing of cross-motions for partial summary judgment, the district court held that federal law both governs the case and supplies the rule of decision. The court concluded that, under federal law, if the exposed lands constitute a reliction, the United States owns the relicted lands (*id.* at A31-A32).[3]

The second phase of the district court litigation was a bench trial to determine whether reliction occurred at Mono Lake. Specifically at issue was whether the recession of water at the lake has been "gradual and imperceptible" (Pet. App. A3).[4] Taking all record evidence into account,

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[3] "Reliction" refers to the gradual and imperceptible recession of a water boundary, leaving exposed land. "Accretion" refers to the gradual and imperceptible accumulation of bits of rock, sand and dirt into new lands, or alluvion, on a shore. The "terms are often used interchangeably, and [the] law relating to accretions applies in all its features to reliction." 3 *American Law of Property* § 15.26, at 855 (A.J. Casner ed. 1952), cited in *Oregon ex rel. State Land Bd.* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 387 n.7 (1977) (Marshall, J., dissenting on other grounds). See also *Alexander Hamilton Life Ins. Co.* v. *Gov't of the Virgin Islands*, 757 F.2d 534, 538 (3d Cir. 1985). See discussion of federal rule of ownership of relicted lands, *supra* at 11-14.

[4] Prior to trial and upon agreement of the parties, the court appointed an independent expert, David Keith Todd of David Keith Todd Consulting Engineers, Inc., to present the basic hydrologic and physiographic data pertinent to the litigation. Dr. Todd produced a lengthy multi-volume final report, in which shoreline migration rates were calculated. The State's expert, Scott Stine, also calculated the apparent rate of shoreline migration and testified that even at the lake's flattest slopes, during the summertime when peak evaporation and

the district court found that "[t]he average person, in a position to observe shoreline migration at Mono Lake, would not have observed the movement of the shoreline as it was occurring" (*id.* at A40). Having determined that the disputed lands constitute relicted lands in both law and fact, the court concluded that the United States owns the relicted lands at Mono Lake (*id.* at A46).

3. The court of appeals affirmed. It upheld (Pet. App. A13) both the adoption by the district court of the federal reliction doctrine as the rule of decision and that court's application and construction of the federal rule to the recession at Mono Lake. The court of appeals rejected as misplaced the State's reliance on *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979), as requiring adoption of state law. The court explained that (1) borrowing state law is precluded here because Congress has stipulated in Section 5(a) of the Submerged Lands Act (Act), 43 U.S.C. 1313(a), that accretions to federal lands are excepted from that Act's grant to the states of lands beneath navigable waters (Pet. App. A5-A6); and (2) the circumstances present in *Wilson* requiring adoption of a state rule of decision are not present in this case (*id.* at A7-A8). The court also

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diurnal variations affect shoreline migration, he witnessed no shoreline migration during his many days at the lake (Tr. 593-596). Furthermore, he was of the opinion that the average person, in a position to observe shoreline migrations at the lake, would not have observed the movement of the shoreline as it was occurring (Tr. 608-609).

The court also heard testimony from David Blau, on behalf of the United States, on the question of perceptibility of lake level and shoreline change. Mr. Blau analyzed the existing setting, determined the amount of change in water levels that would be appropriate to depict, and then portrayed that change, using photos and computer simulation to compare the appearance of the shoreline after a decline of the water level. In each instance, with a variety of conditions illustrated, it was Mr. Blau's professional opinion that that change in lake level would not be perceptible (Tr. 716-749).

rejected the State's claim "that what it terms 'the intentional uncovering' of a lake presents a novel circumstance within federal law" (*id.* at A9), explaining that (1) "federal law makes no exception for relictions * * * resulting from artificial causes" (*ibid.*); and (2) the State cannot characterize the recession at Mono Lake as an "intentional uncovering" and then claim that ownership questions are resolved by reference to the law of a few other states relating to ownership of land deliberately exposed by reclamation or drainage, because the diversions here were not for any such purpose and the State did not challenge the district court's finding to that effect (*id.* at A9-A10). Finally, the court of appeals determined that the district court correctly applied the reliction doctrine to the shoreline recession at Mono Lake in reaching its conclusion that the recession was gradual and imperceptible and thus constituted a reliction (*id.* at A10-A13).

ARGUMENT

The court of appeals correctly applied settled principles to the facts of this case. The decision does not conflict with any decision of this Court or of any other court of appeals. Accordingly, no further review is warranted.

1. Petitioner contends (Pet. 8) that the court of appeals erred in finding the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, and *California ex rel. State Lands Commission* v. *United States*, 457 U.S. 273 (1982) (*State Lands Commission*), relevant to deciding whether state or federal law should supply the rule of decision in this case. Petitioner asserts (Pet. 11) that the choice of law question instead is controlled, in its favor, by *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979). These contentions are incorrect.

a. First, the court of appeals correctly held that federal law supplies the rule of decision here because Congress, in the Submerged Lands Act, has established a

uniform federal statutory directive that governs ownership of the disputed lands in this case. Section 3(a) of the Act provides that "title to and ownership of the lands beneath navigable waters, within the boundaries of the respective States * * * be * * *, *subject to the provisions hereof*, recognized, confirmed, established, and vested in and assigned to the respective States * * *" (43 U.S.C. 1311(a) (emphasis added)).[5] Section 5(a) of the Act, however, excepts "from the operation of Section 1311", and preserves federal title to, "all accretions" attaching to "lands expressly retained by or ceded to the United States when the State entered the Union" (43 U.S.C. 1313(a)).

It hardly needs saying that these provisions, defining the scope of a state's interests, are not subject to unilateral expansion by the affected state. Congress having determined that past and further accretions and relictions are excluded, no state can alter that result. Nor can any state unilaterally increase its interest to include some accretions by applying its own narrower definition of that term. Plainly, this federal statute must be read to treat all states alike, defining the scope of the states' interests in accordance with uniform federal rules.

The court of appeals correctly concluded that this congressional directive is dispositive of the choice of law question in this case, just as this Court found it to be in *State Lands Commission*. *State Lands Commission* concerned title to land created through accretion, due entirely to construction of a jetty, to land owned by the United States on the coast of California. The State urged the Court, as it

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[5] Section 2(a) of the Act defines "lands beneath navigable waters" to mean "all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union * * *, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction" (43 U.S.C. 1301(a)).

does here, to adopt state law as the rule of decision. In rejecting that contention, this Court held: "First, and dispositive in itself, is the fact that Congress has addressed the issue of accretions to federal land" (457 U.S. at 283). The Court explained (457 U.S. at 283-284):

> The Submerged Lands Act, 43 U.S.C. § 1301 *et seq.*, vested title in the States to the lands underlying the territorial sea, which, in California's case, extended three miles seaward from the ordinary low-water line. The Act also confirmed the title of the States to the tidelands up to the line of mean high tide. Section 5(a) of the Act, however, withheld from the grant to the States all "accretions" to coastal lands acquired or reserved by the United States. 43 U.S.C. § 1313(a). In light of this provision, borrowing for federal-law purposes a state rule that would divest federal ownership is foreclosed. In *Wilson*, where we did adopt state law as the federal rule, no special federal concerns, let alone a statutory directive, required a federal common-law rule.

In light of Section 5(a), the Court "appl[ied] the federal rule that accretions, regardless of cause, accrue to the upland owner" (457 U.S. at 285) and ruled that the United States held title to the disputed land (*ibid.*). The same reasoning fully applies here.

Petitioner recognizes "[t]he fact that federal property adjoining inland waters may fit within the literal scope of Section 5(a)" (Pet. 14), but asserts that the Act nonetheless cannot affect the choice of law question in cases involving inland waterways because the Act merely confirmed the States' titles to land underlying inland navigable waters that they had long ago acquired under the equal footing doctrine.[6] This contention seriously misconceives both the

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[6] Under the equal footing doctrine, new states, upon their admission to the Union, acquired title to the lands underlying navigable

effect of the Submerged Lands Act and its relationship to the equal footing doctrine. In *Oregon ex rel. State Land Bd.* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977) (*Corvallis*), the Court reasoned that "[o]nce the equal-footing doctrine had vested title to the riverbed in Arizona as of the time of its admission to the Union, the force of that doctrine was spent; it did not operate after that date to determine what effect on titles the movement of the river might have" (429 U.S. at 371). The Court in *Corvallis* concluded that "[t]he equal-footing doctrine did not, therefore, provide a basis for federal law to supersede the State's application of its own law * * *, and state law should have been applied *unless there were present some other principle of federal law requiring state law to be displaced*" (*ibid.* (emphasis added)). Here, federal law does require that state law be displaced. The Court in *Corvallis* held that the equal footing doctrine did not convey an ambulatory title, whereas the Submerged Land Act established exactly that in Section 5(a), with regard both to inland and coastal waters, where the water borders federal lands.[7]

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water within their boundaries. See *Utah Division of State Lands* v. *United States*, No. 85-1772 (June 8, 1987), slip op. 1-2; *Shively* v. *Bowlby*, 152 U.S. 1 (1894).

[7] Petitioners also misconstrue (Pet. 14) a statement in our brief to the Court in *State Lands Commission* as expressing agreement with its proposition that the Submerged Lands Act has no application to inland situations. In fact, we made no such assertion. Our statement that "the holding of *Corvallis* * * * recognizes that a state *may*, by local law, retain once submerged lands that the Submerged Lands Act does not embrace" (*ibid.* (emphasis added)) is wholly consistent with our position in this case. The Submerged Lands Act "does not embrace" the question of ownership of accretions to uplands owned by private parties. Thus, a state "may by local law, retain" such lands. The Act does, however, embrace the question of ownership of accretions to federally owned uplands, and the state may not, by local law, retain such once-submerged lands.

b. Nor is petitioner correct in contending that the court of appeals' judgment conflicts with this Court's decision in *Wilson* v. *Omaha Indian Tribe, supra*, and that the reasoning in *Wilson* requires that state law supply the rule of decision here as it did in that case. As the court of appeals (Pet. App. A7-A8) and the district court (*id.* at A26-A27) recognized, the issue in *Wilson* differed significantly from that here.

The choice of law question here is whether ownership of the exposed lands at Mono Lake should be determined by the use of federal law or California law. We have shown that federal law supplies the rule of decision because of Congress's directive in Section 5(a) of the Submerged Lands Act. By contrast, as this Court recognized in *State Lands Commission* (457 U.S. at 278 n.7), *Wilson* was "a case not involving a boundary dispute." The issue before the Court in *Wilson* was not the choice of federal or state law to determine ownership of accreted or relicted lands, but rather, in the Court's own statement of the issue, "whether federal or state law determines whether the critical changes in the course of the Missouri River in this case were accretive or avulsive" (442 U.S. at 658). The Court specifically noted that what constitutes an avulsion differed under federal and state law (*id.* at 663 n.12).

Simply stated, because the Submerged Lands Act does not address that definitional distinction between avulsions and accretions it has no relevance to the choice between federal and state law to provide "the rules that will identify and distinguish between avulsion and accretions" (442 U.S. at 673) at issue in *Wilson*. The Act does, however, address the ownership of accretions to federal uplands, and thus requires application of federal law to ownership of the disputed lands at Mono Lake.[8]

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[8] Even if *Wilson* were otherwise applicable, the choice of California law would still be barred here because "specific aberrant or hostile state rules do not provide appropriate standards for federal law."

United States v. *Little Lake Misere Land Co.*, 412 U.S. 580, 595-596 (1973). Petitioner is wrong in stating that, under California law, "the parties *will not* always occupy the same relative positions, because the United States may own the beds of navigable waters. * * * In California * * *, the United States appears to own the beds of three navigable lakes and could benefit from state law regarding ownership of uncovered lake beds" (Pet. 17 n.6 (emphasis in original)). The United States does own those lake beds, although not because of the application of any general "state law regarding ownership of uncovered lake beds" (*ibid.*), but because of a specific California statute ceding those particular lake beds to the United States. 1905 Cal. Stat. 4. And, specifically, there is no general California law regarding ownership of uncovered lake beds which could benefit the United States. The California law cited by petitioner (Pet. 18 n.7) for the proposition that exposed lake beds continue to belong to the owner of the bed, could benefit *only* the State, and not any other owner of lake beds. That law, Cal. Pub. Res. Code § 7601 (*West* 1977), provides, in part, that "[a]ny person desiring to purchase any of the lands uncovered by the recession or drainage of the waters of the inland lakes, and inuring to the State by virtue of her sovereignty" may apply to purchase such lands. The provision refers only to the purchase of exposed lake beds which inure "to the *State* by virtue of her sovereignty" (emphasis added). Thus, only the State—not the United States or any other lake bed owner—could arguably utilize this provision as evidence of ownership of such exposed lands.

Moreover, the California Statehood Act itself barred the State from impairing the title of the United States to public lands littoral or riparian to navigable waters. See Act of Sept. 9, 1850, ch. 50, § 3, 9 Stat. 452. And petitioner cannot rely on its selective historical assertions in claiming that "federal interests would not be harmed by a state rule" (Pet. 18), because no estoppel was alleged against the United States in the complaint, and any claim based on statements by federal officials who themselves lacked authority to dispose of government property would be frivolous. See *United States* v. *California*, 332 U.S. 19, 40 (1947); see also *State Lands Commission*, 457 U.S. at 276 n.4. In short, the only California law arguably relevant to these circumstances could never operate to benefit the federal government, and such a hostile rule "do[es] not provide appropriate standards for federal law" (*Little Lake Misere Land Co.*, 412 U.S. at 596).

2. Petitioner further contends, incorrectly, that even if federal law does supply the rule of decision, there is no federal rule "to determine ownership of lake beds uncovered by intentional diversions or drainage" (Pet. 19), and that "general common law supports California's retention of the uncovered bed" (*ibid.*) by application of a supposed "drainage rule in which the submerged bed owner retains the uncovered bed" (*id.* at 20). Petitioner presents a novel, but futile, argument that "the intentional uncovering of a lake bed by diversions" (*id.* at 21) does not involve any question concerning reliction and, hence, there is no established federal common law to apply in these circumstances.[9]

At bottom, the State's contention is that the federal reliction rule does not apply to shoreline changes at a lake—rather than a river or the ocean—at least where those changes result from "intentional diversions." To the contrary, the federal rule neither distinguishes between ownership of lands "uncovered" at a lake as opposed to a river or ocean, nor recognizes any distinction in this context between shoreline changes resulting from artificial conditions (*e.g.*, "intentional diversions") as opposed to natural conditions. The established federal rule is that, regardless of whether due to natural or artificial conditions, the upland owner benefits from relicted lands, and, similarly, suffers the loss of land due to erosion:

> For over 100 years it has been settled under federal law that the right of future accretion is an inherent

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[9] The State's contention that the reliction doctrine is not implicated by the shoreline recession at Mono Lake is not without irony. As the district court noted (Pet. App. A14-A15 n.1), the State initially proposed a stipulation that the lands at issue are relicted lands, but then refused to so stipulate when the United States agreed. The State's first suggestion of the theory that the reliction doctrine may have no application here occurred when the State sought reconsideration of the district court's choice of law determination. See Memorandum of the State of California, etc., in Support of Motion for Reconsideration, 20 n.7.

> and essential attribute of the littoral or riparian owner. *New Orleans* v. *United States*, 10 Pet. 662, 717 (1836); *County of St. Clair* v. *Lovingston*, 23 Wall. at 68. " 'Almost all jurists and legislators * * * both ancient and modern, have agreed that the owner of the land thus bounded is entitled to these additions.' " *Jefferis* v. *East Omaha Land Co.*, 134 U.S. at 189, quoting *Banks* v. *Ogden*, 2 Wall. 57, 67 (1865).
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> * * * * *
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> Applying the federal rule that accretions, *regardless of cause*, accrue to the upland owner, we conclude that title to the entire disputed land in issue is vested in the United States.

State Lands Commission, 457 U.S. at 284-285 (emphasis added). See also *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313, 325-327 (1973) (overruled on other grounds). In *State Lands Commission*, the Court referred to this rule as the "long-established federal law" (457 U.S. at 278), "the historic rule" (*id.* at 285), "the long-established federal rule" (*id.* at 286), and "the long-settled rule" (*ibid.*).[10]

This Court has plainly recognized the application of this doctrine to ownership of land exposed by the recession of waters at inland lakes, as well as at rivers, streams, and ocean shoreline. The Court in both *State Lands Commission* (457 U.S. at 278) and *Bonelli* (414 U.S. at 325) cited as authority for its statement of the historic federal rule the case of *Jones* v. *Johnston*, 59 U.S. (18 How.) 150

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[10] Petitioner, too, described this rule to the district court as "[t]he general rule" (Memorandum of Points and Authorities in Support of Plaintiff's Motion for Partial Summary Judgment, at 11), while urging that the general rule does not apply in California because of the State's "artificial accretion" rule (*id.* at 12). See *State Lands Commission*, 457 U.S. at 284-285 n.12, for a rejection of California's rule for federal law purposes.

(1856), in which the Court applied the doctrine to questions of ownership of land exposed by recession of waters at the shore of Lake Michigan.[11] Drawing on precedents from cases involving shoreline changes at rivers and the sea, the Court stated the same rule more recently described as "the historic rule" (*id.* at 155-156):

> If the call for the southern boundary, instead of being a lake, which is a shifting line, had been a permanent object, such as a street or wall, there could not be two opinions as to the location. And yet the water-line, though it may gradually and imperceptibly change, is just as fixed a boundary in the eye of the law as the former. I speak not now of sudden and considerable changes, which are governed by different principles.
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> * * * * *
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> Land gained from the sea either by alluvion or dereliction if the same be by little and little, by small and imperceptible degrees, belongs to the owner of the land adjoining.

Contrary to petitioner's contention (Pet. 20), therefore, there is settled federal law under which the reliction doctrine applies to the circumstances at Mono Lake. Like those in *Jones* v. *Johnston, supra* the diversions here have resulted in the recession of the shoreline and the exposure of previously submerged lands at a lake, and the federal rule regarding ownership of such lands is thus controlling.

The State's contention that a different rule should apply because the shoreline changes at Mono Lake resulted from "intentional diversions" is an attempt to engraft a novel

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[11] The Court explained that the construction of the Chicago harbor had the effect of diverting the Chicago River where it met the lake, resulting in "the recession of the waters to the extent of some twelve hundred feet in width, and for a considerable * * * length northward along the shore." *Id.* at 152. See also *Banks* v. *Ogden,* 69 U.S. (2 Wall.) 57 (1865).

and confusing exception on the federal reliction rule.[12] There is no warrant for the creation of such an exception, which would radically change the law with respect to waterfront boundary disputes. After all, activities affecting navigable waters are commonplace, and many water boundary changes have resulted incidentally from various governmental or private activities which, as here, were undertaken for purposes other than changing the shoreline boundaries. Boundary disputes in such circumstances have historically followed the traditional rules of reliction, accretion, erosion, and avulsion.

3. Finally, petitioner objects to the test employed by the district court for determining that the shoreline migration at Mono Lake was gradual and imperceptible and thus constituted a reliction. The district court based its test directly (Pet. App. A43) on this Court's statement in *Philadelphia Co.* v. *Stimson,* 223 U.S. 605, 624 (1912):

> * * * It is when the change * * * is sudden, or violent, and visible, that title remains the same. It is not enough that the change may be discerned by com-

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[12] There is no relevance here to cases cited (Pet. 21) by petitioner for the proposition that the reliction doctrine does not apply to the intentional uncovering or drainage of a lake. At no time in this lawsuit has petitioner even attempted to demonstrate that the State of California intentionally uncovered a portion of Mono Lake, or intentionally drained Mono Lake, so as to expose lands, nor did the State challenge below the district court's determination (Pet. App. A46) that the diversions do not constitute a drainage or reclamation project. The State, in fact, explicitly asserted to the district court that its purpose in permitting the diversions was not to uncover lands, but was to provide water to Los Angeles:

> *The State's purpose* in allowing the diversion of the waters from Mono Lake *was not to obtain title to the exposed lands,* but * * * to provide domestic water to the people of Los Angeles.

Memorandum of Points and Authorities in Further Support of Plaintiff's Motion for Partial Summary Judgment, etc., at 25 (emphasis added).

> parison at two distinct points of time. It must be perceptible when it takes place. "The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process is going on." *County of St. Clair* v. *Lovington, supra,* at 68.

Petitioner objects to the district court's determination that the shoreline change at Mono Lake was gradual and imperceptible by considering whether the change was perceptible "as it was occurring" (Pet. App. 40). Petitioner contends that "no common law court has ever found changes" in shoreline to be gradual and imperceptible that are observable "over 'short term' periods of hours, days, and weeks" (Pet. 22).[13]

Petitioner's assertion is baseless, and plainly warrants no further review. First, it flies directly in the face of this Court's admonition, stated in the test utilized by the district court, that "[i]t is not enough that the change may be discerned by comparsion at two distinct points [in] time" (*Stimson,* 223 U.S. at 624). Petitioner nevertheless offers several cases (Pet. 23-24) that, it asserts, either directly or indirectly support a different viewing period than that set out in *Stimson.* For example, it suggests that a Wisconsin case decided 35 years before *Stimson* evinces its version of the test. But that case has not since been cited in support of such a test even in Wisconsin. Petitioner also

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[13] The State implicitly conceded below that, under the test applied by the district court, there is substantial evidence in the record to support the conclusion that the changes were gradual and imperceptible. No argument was presented in the court of appeals contesting that conclusion under this test. The State summarizes its own version of the evidence in its petition (Pet. 22-23, n.10), as it did in the court of appeals, but presents no argument that the district court's factual findings were in error. Nor could it on this record. See, *e.g., Anderson* v. *City of Bessemer,* 470 U.S. 564 (1985).

cites an English case, *Attorney General* v. *Reeve,* 1 T.L.R. 675 (1885), in which the court appeared to permit comparison of a water boundary at two distinct points in time. However, the position in that case was explicitly later disavowed in *Attorney General* v. *McCarthy,* 2 I.R. 260 (1911), just as it directly conflicted with the earlier English case of *The King* v. *Lord Yarborough,* 107 Eng. Rep. 668 (K.B. 1824). *Lord Yarborough* defined imperceptible "as meaning imperceptible *in its progress*" (*id.* at 674 (emphasis added)).

Petitioner mistakenly also claims support (Pet. 18 n.7) for the proposition that "the uncovering of Mono Lake would not be gradual and imperceptible" in one California case, *People* v. *William Kent Estate Co.,* 242 Cal. App. 2d 156, 51 Cal. Rptr. 215 (1966). *Kent* involved a situation where seasonal increases and decreases in the shoreline occurred regularly each winter and summer in offsetting pairs. The California Court of Appeals stated that, in circumstances like those, such seasonal fluctuations could result in "constantly transferring ownership of the intermediate land" (242 at 160, 51 Cal. Rptr. at 218) if the doctrine of accretion were applied. Consistent with this Court's admonition that such nonpermanent seasonal fluctuations do not cause boundaries to change,[14] the state court concluded that seasonal fluctuations "cannot meet the definitions of natural accretion and deliction" (*ibid.*). *Kent* thus stands for the well-established exception to the accretion doctrine under which that doctrine does not

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[14] This Court has long held that neither cyclic nor continual fluctuation affect application of the doctrine of accretion. See *Alabama* v. *Georgia,* 64 U.S. (23 How.) 505, 515 (1859) ("the bed * * * is that portion * * * which is alternatively covered, and left bare, as there may be an increase or diminution in the [water supply], and which is adequate to contain it at its average and mean stage during the entire year, *without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn*" (emphasis added)).

apply to affect ownership where water boundary changes are cyclical, even if the changes are gradual and imperceptible. The State did not contend on appeal, however, that this exception has any application to the shore boundary at Mono Lake, and did not challenge the district court's conclusion that:

> The reliction of Mono Lake is not ephemeral or seasonal, having continued, with some reversals, since 1919. It thus qualifies as a sufficiently long-term trend to warrant application of the doctrine of reliction.

Pet. App. A45.[15]

The State also relies, mistakenly, on the reports of the Special Master in litigation before this Court involving ownership of lands at the Great Salt Lake in *Utah* v. *United States,* No. 31, Original, as evincing a special reliction test for lakes. See Pet. 24. The second phase of that litigation concerned the question whether the reliction doctrine applied in that case. The Special Master, in his second Report to the Court, determined that, due to a rising trend in lake elevation—which brought the lake to within a few inches of its statehood level as of the date of the hearing before the Special Master—nearly all of the previously exposed lands had been resubmerged. Report of Special Master at 24. The Special Master emphasized that the unique nature of that lake bed "causes a gradual and slight change in the elevation of the lake to result in a much greater alteration of the relation of the water to the

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[15] In fact, California decisions do not compare different points in time to determine whether water boundary changes have been gradual and imperceptible, but are consistent with the rule expressed in *Stimson.* See, *e.g., Miramar Co.* v. *City of Santa Barbara,* 23 Cal. 2d 170, 143 P.2d 1 (1943); *Ward Redwood Co.* v. *Fortain,* 16 Cal. 2d 34, 38-39, 104 P.2d 813, 815-816 (1940); *City of Los Angeles* v. *Anderson,* 206 Cal. 662, 666-667, 275 P. 789, 791 (1929); *Strand Improvement Co.* v. *Long Beach,* 173 Cal. 765, 161 P. 975 (1916).

land" (*id.* at 18). Ultimately, the Special Master concluded that, due to the unique character of the changes at the area, "[t]hese changes *were not* at the date of the quitclaim deed *of such a reasonably permanent or stable character as to warrant application of the [reliction] doctrine*" (*id.* at 32 (emphasis added)). Based on this conclusion, the Special Master proposed a decree to the Court concerning the ownership of the relevant lands (*ibid.*). In short, the Special Master concluded that he could not apply the reliction doctrine to the particular circumstances at the Great Salt Lake because the changes, like those discussed in *Kent,* were not of a reasonably stable basis. Like *Kent*, this Report has no authoritative value at all in the present circumstances, where the disputed lands at Mono Lake are exposed as a result of a long-term recession since the high stand in 1919.[16]

The net result of adopting the State's test would be a shift away from the traditional presumption that boundary changes occur by accretion rather than avulsion (Pet. App. A44), *i.e.,* a presumption that water boundaries are ambulatory unless the change which occurs "is sudden, or violent" and "visible" (*Stimson,* 223 U.S. at 624). This presumption is based on sound and long-established policies underlying the accretion doctrine, which would be frustrated should petitioner's new test be adopted. These policies have been well summarized by this Court in *Bonelli Cattle Co.* v. *Arizona,* 414 U.S. at 326 (overruled on other grounds):

> There are a number of interrelated reasons for the application of the doctrine of accretion. First, where

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[16] Moreover, even if the Report were relevant there, it would be of limited authority. Only the Special Master's proposed decree, with modifications agreed to by the parties, were adopted by the Court. *Utah* v. *United States,* 420 U.S. 304 (1975). The Court did not adopt the opinion, findings of fact, or conclusions of law, in the Special Master's Report.

> lands are bounded by water, it may well be regarded as the expectancy of the riparian owner that they should continue to be so bounded. Second, the quality of being riparian, especially to navigable water, may be the land's "most valuable feature" and is part and parcel of the ownership of the land itself. *Hughes* v. *Washington, supra,* at 293; *Yates* v. *Milwaukee,* 10 Wall. 497, 504 (1871). Riparianness also encompasses the vested right to future alluvion, which is an "essential attribute of the original property." *County of St. Clair* v. *Lovingston,* 23 Wall. 46, 68 (1874). By requiring that the upland owner suffer the burden of erosion and by giving him the benefit of accretions, riparianness is maintained. Finally, there is a compensation theory at work. Riparian land is at the mercy of the wanderings of the river. Since a riparian owner is subject to losing land by erosion beyond his control, he should benefit from any addition to his lands by the accretions thereto which are equally beyond his control. *Ibid.*

By contrast, petitioner offers no policy justification for its novel test, which would result in much more frequent loss of riparian ownership rights.

In sum, under established principles, title to the exposed lands vested in the United States as the reliction occurred. (*State Lands Commission,* 457 U.S. at 278). The court of appeals therefore properly affirmed the district court's determination that title to the disputed lands remains in the United States.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General
F. HENRY HABICHT II
Assistant Attorney General
JACQUES B. GELIN
WILLIAM B. LAZARUS
Attorneys

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